

## **STATE WATER CONTROL BOARD ENFORCEMENT ACTION**

### **A SPECIAL ORDER BY CONSENT ISSUED TO**

**CMS, Inc.  
Sunchase Apartments  
Permit Number VAR470804**

#### **SECTION A: Purpose**

This is a Consent Special Order issued under the authority of Va. Code §§ 10.1-1185 and 62.1-44.15(8a) and (8d), between the State Water Control Board and CMS, Inc. for the purpose of resolving certain violations of environmental law and regulations.

#### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meanings assigned to them below:

1. “Va. Code” means the Code of Virginia (1950), as amended.
2. “Board” means the State Water Control Board, a permanent citizen board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. “Department” or “DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. “Director” means the Director of the Department of Environmental Quality.
5. “Order” means this document, also known as a Consent Special Order.
6. “SCRO” means the South Central Regional Office of the DEQ, located in Lynchburg, Virginia.

7. “Site” means the construction activities of CMS, Inc. known as “Sunchase Apartments” located north of the State Highway Business 460 intersection with Longwood Avenue in Farmville, Virginia.
8. “Owner” means CMS, Inc. which owns and controls the Site.
9. “VPDES” means the Virginia Pollution Discharge Elimination System.
10. “Permit” means VPDES Permit number VAR470804 issued to CMS, Inc. for the construction activities at the Site on July 2, 2002, with an effective date of June 30, 1999, and expiration date of June 30, 2004.

**SECTION C: Findings of Facts and Conclusions of Law**

1. The Owner is engaged in construction activities that disturbed approximately 35 acres at the Site, which began in July 2002. However, the Owner’s registration statement for the Permit states that the total land area for the Site is 17.02 acres; the Owner asserts that this was an administrative error.
2. The Site is the subject of VPDES Permit number VAR470804, which allows the Owner to discharge storm water into an unnamed tributary of the Appomattox River in strict compliance with the terms, limitations, and requirements delineated in the Permit.
3. On October 16, 2002, the DEQ received a pollution complaint regarding sediment leaving the Site and entering the unnamed tributary.
4. On October 18, 2002, staff from the SCRO of DEQ conducted an unannounced inspection of the Site; prior to the October 18 inspection the Site received three days of significant (half inch or greater) rainfall. On October 22, 2002, the DEQ met with the Owner, the Owner’s consultant, contractors, and subcontractors to inspect the Site and discuss compliance with the Permit.
5. On October 30, 2002, the Owner was issued a Notice of Violation (“NOV”) number NOV-02-10-SCRO-003, which alleged the following violations:
  - a. Failure to retain the Storm Water Pollution Prevention Plan (“SWPPP”) on Site in accordance with Part II B 2 of the Permit;

- b. Failure to maintain erosion and sedimentation (“E & S”) controls in accordance with Part II D 3 of the Permit; and
- c. Sediment deposition in the unnamed tributary.

The Owner also failed to report the unauthorized discharge cited in the NOV, which is required by Part III G of the Permit.

6. Subsequently, the DEQ learned that the SWPPP was on Site but not at a central location, which is required by Part II B 2 of the Permit.
7. On October 30, 2002, the DEQ received a Corrective Action Plan (“CAP”) from the Owner “to attain and remain in compliance” with the Permit.
8. On December 4, 2002, the U.S. Army Corps of Engineers (“COE”) and DEQ approved the Owner’s CAP for implementation, which is estimated to cost \$83,359.00. The COE is requiring a performance bond for a retaining wall, and corrective action to re-establish the riparian buffer. The riparian buffer is a requirement in the Nation Wide Permit (“NWP”) 39 issued for the Site.
9. On February 4, 2003, the DEQ conducted an unannounced Site inspection and found that the CAP was being implemented. The DEQ requested the Owner submit all materials that encompassed the SWPPP for the Site. On February 18, 2003, the DEQ received the SWPPP.
10. On March 6, 2003, the DEQ and the COE met with the Owner’s consultant and contractors to assess the loss of four tenths of an acre of the riparian buffer, which resulted from an error in locating the limits of clearing, and silt fence and chain link fence installation. The DEQ noted that the Owner had installed several best available technology E & S controls to achieve compliance with the Permit.
11. The encroachment into the riparian buffer has physically altered the unnamed tributary by increasing the velocity of the storm water discharge, and thus accelerating stream bank erosion. This physical alteration was not permitted and is in contravention of Va. Code § 62.1-44.5.A.3 and 9 Virginia Administrative Code (“VAC”) 25-31-50.A.2. Part of the CAP

approved by the COE requires the Owner to conduct stream bank stabilization.

12. After review of the SWPPP for the Site the DEQ notified the Owner in writing on April 3, 2003, of apparent deficiencies in the SWPPP. The Owner replied submitting additional information on April 15, 2003. Prior to beginning construction the SWPPP failed to contain contract certifications in accordance with Part II E 2 of the Permit, and a schedule and description of E & S maintenance in accordance with Part II D 3 of the Permit. Further, the inspection reports required by Part II D 4 c of the Permit failed to include all required information.

#### **SECTION D: Agreement and Order**

Accordingly, the Board, by virtue of the authority granted in Va. Code § 62.1-44.15(8a) and (8d), orders the Owner, and the Owner agrees, to perform the actions contained in Appendix A of this Order. In addition, the Board orders the Owner, and the Owner consents, to pay a civil charge of \$5,600.00 within 30 days of the issuance of this Order in settlement of the violations cited herein. The payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia", and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 10150  
Richmond, Virginia 23240

The payment shall include the Owner's Federal Identification Number and shall state that it is being tendered in payment of the civil charge assessed under this Order.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend the Order with the consent of the Owner, for good cause shown by the Owner, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves the matters specifically discussed herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including, but not limited to: (1) taking any

action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the Site as may be authorized by law; or (3) taking subsequent action to enforce the terms of this Order.

3. For purposes of this Order and subsequent actions with respect to this Order, the Owner admits to the jurisdictional allegations.
4. The Owner consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. The Owner declares that it has received fair and due process under the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, and the State Water Control Law, and waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by the Owner to comply with any of the terms of this Order shall constitute a violation of an Order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. The Owner shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. The Owner must show that such circumstances resulting in noncompliance were beyond its control and not due to a lack of good faith or diligence on its part. The Owner shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have

occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of any such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition listed above, which the Owner intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees, and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and the Owner. Notwithstanding the foregoing, the Owner agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. The Owner petitions the Regional Director to terminate the Order after it has completed all requirements of the Order. The Director's determination that the Owner has satisfied all requirements of the Order is a "case decision" within the meaning of the Virginia Administrative Process Act; or
  - b. The Director or the Board may terminate this Order in his or its sole discretion upon 30 days written notice to the Owner.

Termination of this Order, or of any obligation imposed in this Order, shall not operate to relieve the Owner from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, the Owner consents to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2003

\_\_\_\_\_  
Robert G. Burnley, Director  
Department of Environmental Quality

CMS, Inc. consents to the issuance of this Order.

Date: \_\_\_\_\_ By: \_\_\_\_\_  
Richard R. Abidin, Vice President, CMS, Inc.

Commonwealth of Virginia  
City/County of \_\_\_\_\_

The foregoing document was signed and acknowledged before me this \_\_\_\_\_ day  
of \_\_\_\_\_, 2003, by \_\_\_\_\_, Richard R. Abidin, Vice  
President of CMS, Inc., on behalf said corporation.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_.

(The remainder of this page is intentionally left blank.)

## **Appendix A**

### **The Owner shall:**

1. Henceforth comply with all VPDES Permit requirements.
2. Compliance with item number 1 of Appendix A shall be determined by unannounced Site inspections within 1 year of the issuance of this Order.
3. Unless otherwise specified in the Order, or the Permit, all correspondence related to the Order shall be sent to:

Harry F. Waggoner  
Virginia Department of Environmental Quality  
7705 Timberlake Road  
Lynchburg, Virginia 24502





